

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Alex Spiro (*pro hac vice* forthcoming)

2 alexspiro@quinnemanuel.com

51 Madison Ave 22nd floor

3 New York, NY 10010

Telephone: (212) 849-7000

4 Facsimile: (212) 849-7100

5 Michael T. Lifrak (Bar No. 210846)

michaellifrak@quinnemanuel.com

6 Joseph C. Sarles (Bar No. 254750)

josephsarles@quinnemanuel.com

7 Alex Bergjans (Bar No. 302830)

alexbergjans@quinnemanuel.com

8 Aubrey L. Jones (Bar No. 326793)

aubreyjones@quinnemanuel.com

9 865 S. Figueroa Street, 10th Floor

Los Angeles, California 90017

10 Telephone: (213) 443-3000

Facsimile: (213) 443-3100

11 Attorneys for Defendants Elon Musk, X

12 Holdings I, Inc., and X Holdings II, Inc.

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

16 WILLIAM HERESNIAK, on behalf of
17 himself and all others similarly situated,

18 Plaintiff,

19 vs.

20 ELON R. MUSK, X HOLDINGS I, INC., X
21 HOLDINGS II, INC., and TWITTER, INC.,

22 Defendant.

CASE NO. 3:22-CV-03074-CRB-SK

**DEFENDANTS X HOLDINGS I, INC.
AND X HOLDINGS II, INC.'S MOTION
TO DISMISS THE FIRST AMENDED
COMPLAINT AND STAY DISCOVERY**

Judge: Hon. Charles R. Breyer

Courtroom: 6, 17th Floor

Hearing Date: December 2, 2022

Time: 10 a.m.

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PLEASE TAKE NOTICE THAT, on December 2, 2022,¹ or as soon thereafter as the matter may be heard, defendants X Holdings I, Inc. and X Holdings II, Inc. (“Holding Companies”) will hereby move the above entitled Court to dismiss Plaintiff’s First Amended Complaint (“FAC”) (Dkt. 7) and for a discovery stay pending the resolution of related actions pending in other courts, including *Twitter, Inc. v. Musk, et al.*, C.A. No. 2022-0613 KSJM, or the resolution of pleadings motions, pursuant to the doctrine of forum non conveniens, Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), 12(b)(6), 23.1, and the Court’s inherent authority.

The motion asks the Court to (1) dismiss the FAC in its entirety under the doctrine of forum non conveniens, (2) dismiss the FAC in its entirety pursuant to Rules 12(b)(6) and 23.1 because its claims are derivative and fail to comply with Rule 23.1, (3) dismiss the first cause of action for failure to state a claim, (3) dismiss the second cause of action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and for failure to state a claim, and (4) stay discovery.

SUMMARY OF ARGUMENT

Plaintiff has filed this action in the wrong Court, in violation of a mandatory forum-selection clause, seeking a declaration and injunction regarding a contract he has no standing to enforce, and asserting a claim against the Holding Companies based on a single conclusory allegation that they took unidentified “actions” constituting aiding and abetting breach of fiduciary duty. Plaintiff’s defective First Amended Complaint should be dismissed in its entirety and discovery should be stayed.

As a threshold matter, the Court need not reach the FAC’s many substantive deficiencies. Instead, it can and should simply dismiss the action pursuant to forum non conveniens. Plaintiff, a Twitter shareholder residing in Virginia, filed this putative class action alleging the Holding Companies and Elon Musk aided and abetted two Twitter directors’ breach of fiduciary duties to the company. But Twitter’s Bylaws contain a mandatory forum-selection clause, binding on

¹ Before they were assigned to this Court, the parties entered and Judge Kim granted a scheduling stipulation which provided that “any hearing on any motion to dismiss will be noticed for November 21, 2022 or as soon thereafter as the parties and the Court are available.” (Dkt. 20 at 2.) Because the Court hears civil motions on Fridays and the first Friday following November 21 is the day after Thanksgiving, December 2 appears to be the earliest date on which all parties are available.

1 Plaintiff, requiring that the Court of Chancery for the State of Delaware (“Chancery Court”) “be
 2 the sole and exclusive forum” for “any action asserting a claim of breach of a fiduciary duty owed
 3 by, or otherwise wrongdoing by, any director.” This clause applies to Plaintiff’s aiding and
 4 abetting claim since an underlying breach of fiduciary duty by a director is a necessary element.
 5 Indeed, courts here and in Delaware have found that forum-selection clauses containing identical
 6 language cover aiding and abetting claims by shareholders. *See e.g., In re Facebook, Inc. S’holder*
 7 *Derivative Priv. Litig.*, 367 F. Supp. 3d 1108, 1121 (N.D. Cal. 2019). Plaintiff—a Virginia
 8 resident asserting Delaware law claims and seeking to enforce a contract governed by Delaware
 9 law—lacks any credible argument under the Ninth Circuit’s forum non conveniens factors to
 10 prevent enforcement of the clause. It should be enforced and wasteful parallel litigation avoided.

11 The FAC’s deficiencies extend beyond the incorrect forum. As explained in Mr. Musk’s
 12 Motion to Dismiss, which the Holding Companies join, the FAC should be dismissed because
 13 Plaintiff’s action is derivative in nature but was improperly brought as a direct action. Plaintiff
 14 seeks to enforce the Merger Agreement on Twitter’s behalf and seeks redress for injury—a
 15 reduction in stock price—suffered by Twitter as a whole and not the shareholders individually.

16 Plaintiff’s individual causes of action also fail. Plaintiff asserts that the Holding
 17 Companies aided and abetted a breach of fiduciary duty, which requires him to plead that they
 18 conspired with Twitter’s Board and directed (or participated) in its decisions with knowledge of
 19 their wrongdoing. Yet the only allegation against them is that they “took” some unidentified
 20 “actions at Musk’s direction to carry out his unlawful conduct.” (FAC ¶ 160.) Plaintiff’s second
 21 cause of action fares no better. He seeks declaratory and injunctive relief related to the Merger
 22 Agreement, but has no standing to enforce it because he is neither a party or third-party
 23 beneficiary to it. And in any event, the declaration he seeks is too vague and indefinite to sustain a
 24 cause of action for declaratory relief. The FAC should be dismissed.

25 Finally, the Court should stay discovery in this case pending the resolution of the Delaware
 26 Action, which is set for trial on October 17, and a first-filed securities action in the Southern
 27 District of New York asserting claims based on the same conduct giving rise to Plaintiff’s unjust
 28 enrichment claim. Plaintiff seeks to enforce the Merger Agreement, the same relief Twitter is

1 pursuing in Delaware, and his action will likely be moot if Twitter prevails. Proceeding with
 2 discovery would therefore be a waste of party and court resources and unnecessarily burden the
 3 Defendants, who are currently litigating these same issues in the Delaware Action. A brief
 4 discovery stay would not harm the Plaintiff and promote the orderly course of justice, as would a
 5 stay pending the action in New York. In the alternative, the Court should stay discovery pending
 6 resolution of the pleadings motions since they are likely to dispose of this entire action and do not
 7 require any discovery to be adjudicated.

8 **STATEMENT OF ISSUES TO BE DECIDED**

9 1. Should the Court dismiss the FAC where Plaintiff filed this action in violation of the
 10 forum-selection clause in Twitter's Bylaws?

11 2. Should the Court dismiss the FAC for failure to state a claim and failure to comply with
 12 Rule 23.1 where Plaintiff, a Twitter shareholder, seeks to recover for harm suffered by Twitter, the
 13 corporation, instead of the stockholders individually and thus are derivative in nature?

14 3. Should the Court dismiss Plaintiff's aiding and abetting breach of fiduciary duty claim
 15 where Plaintiff failed to allege the elements of that claim?

16 4. Should the Court dismiss Plaintiff's declaratory and injunctive relief claim where (1)
 17 Plaintiff is not a party or third-party beneficiary to the Merger Agreement, and (2) Plaintiff's
 18 requested relief is vague and indefinite?

19 5. Should the Court stay discovery pending the resolution of ongoing actions in other
 20 courts involving Defendants, arising from the same issues, and seeking the substantially similar
 21 relief as the FAC or, alternatively, stay discovery pending the resolution of all pleadings motions
 22 where the FAC is likely to be dismissed and no discovery is required to adjudicate the motions?

23 **RELEVANT ALLEGATIONS AND BACKGROUND**

24 The FAC's allegations against the Holding Companies. Plaintiff, a Virginia resident and
 25 purported Twitter shareholder (FAC ¶ 26), filed this putative class action against Elon Musk,
 26 Twitter, and the Holding Companies seeking damages and declaratory and injunctive relief
 27 relating to Mr. Musk's offer to acquire Twitter. (*See generally*, FAC) The gist of Plaintiff's FAC
 28 is that Mr. Musk aided and abetted Twitter directors Jack Dorsey and Egon Durban's breaches of

1 their fiduciary duties to Twitter in connection with the negotiation of the Merger Agreement
 2 governing the acquisition, wrongfully halted the completion of the transaction before closing,
 3 made disparaging statements about Twitter following the execution of the Merger Agreement, and
 4 damaged Plaintiff by causing Twitter’s stock price to decline. (FAC ¶¶ 155-69.) Plaintiff seeks
 5 damages, disgorgement, a declaration concerning “the parties’ respective rights and obligations”
 6 under the Merger Agreement, and unspecified injunctive relief. (*Id.* ¶¶ 162, 165, 169.)

7 As alleged in the FAC, the Holding Companies are Delaware corporations formed to
 8 effectuate the purchase of Twitter. (FAC ¶ 29). X Holdings II is the “Acquisition Sub” and X
 9 Holdings I is its parent. (*Id.*) As of the date of this Motion, the proposed merger has not closed
 10 and the Holding Companies have not acquired Twitter.

11 The FAC asserts two causes of action against the Holding Companies: (1) aiding and
 12 abetting breach of fiduciary duty and (2) declaratory and injunctive relief relating to the Merger
 13 Agreement. (FAC ¶¶ 155-165.) As to the first, the only allegation against the Holding Companies
 14 is that they are “controlled by Musk and took actions at Musk’s direction to carry out his unlawful
 15 conduct.” (*Id.* ¶ 160.) The FAC does not plead any facts establishing Mr. Musk’s control over the
 16 Holding Companies or identify any purported “actions” they allegedly took at Mr. Musk’s
 17 direction. As to the second cause of action, the only allegations against the Holding Companies is
 18 that they signed the Merger Agreement. (*Id.* ¶ 164.)

19 Plaintiff is not a party to the Merger Agreement. The FAC alleges that on April 25, 2022,
 20 the Holding Companies, Twitter, and Mr. Musk executed the Merger Agreement. (FAC ¶¶ 86,
 21 164.) Plaintiff does not allege that he is a party to or a third-party beneficiary of the Merger
 22 Agreement—to the contrary, it alleges the Merger Agreement is between ***Defendants***, not
 23 Plaintiff. (*Id.*, ¶¶ 164-65.)

24 The Twitter Bylaws contain a mandatory forum-selection clause. Twitter’s Bylaws
 25 include a forum-selection clause stating, in relevant part, “the Court of Chancery of the State of
 26 Delaware...shall, to the fullest extent permitted by law, be the sole and exclusive forum for...any
 27 action asserting a claim of breach of a fiduciary duty owed by, or otherwise wrongdoing by, any
 28 director...of the corporation to the corporation...” (Sarles Ex. 4, Bylaws, Art. VIII.)

A. Twitter’s Bylaws Mandate That This Action Be Litigated In Delaware Chancery Court

1. Forum-Selection Clauses In Bylaws Are Enforceable Against Shareholders

The Bylaws’ forum-selection clause is enforceable against Plaintiff, a Twitter shareholder. When Plaintiff purchased stock, he agreed to be bound by Twitter’s valid Bylaws—including the forum-selection clause. *See Facebook*, 367 F. Supp. 3d 1108, 1121 (N.D. Cal. 2019) (enforcing forum-selection clause in certificate of incorporation); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (“a forum selection clause adopted by a board with the authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses.”); *In re: CytRx Corp. S’holder Derivative Litig.*, No. CV146414GHKPJWX, 2015 WL 9871275, at *4 (C.D. Cal. Oct. 30, 2015). The selection clause is valid and enforceable against him here. *See Lee v. Fisher*, 34 F.4th 777, 779 (9th Cir. 2022) (affirming dismissal of shareholder suit due to forum selection clause in corporate bylaws).

2. Plaintiff’s First Claim Falls Within The Bylaws’ Forum-Selection Clause

The Bylaws’ forum-selection clause states that Delaware Chancery Court “shall...be the sole and exclusive forum for...any action asserting a claim of breach of fiduciary duty owed by, or otherwise wrongdoing by, any director”. (Bylaws at Art. VIII.)² Plaintiff asserts the Holding Companies and Mr. Musk aided and abetted a breach of fiduciary duty by two of Twitter’s directors. (FAC ¶¶ 155-62.) The claim is covered by this clause. *See Facebook*, 367 F. Supp. 3d at 1120 (dismissing aiding and abetting claim in shareholder action pursuant to forum-selection clause covering “any action asserting a claim of breach of fiduciary duty owed by, or other wrongdoing by, any director”); *In re Pattern Energy Grp. Inc. Sec. Litig.*, No. CV 20-275-MN-JLH, 2022 WL 263312, at *9–10 n. 8 (D. Del. Jan. 27, 2022), *report and recommendation adopted by*, No. CV 20-275 (MN) (JLH), 2022 WL 957761 (D. Del. Mar. 30, 2022) (same).

² The clause contains a narrow exception for cases in which the Chancery Court lacks jurisdiction. (Bylaws at Art. VIII.) The FAC includes no allegations suggesting such a bar exists.

Plaintiff's claim for aiding and abetting breach of fiduciary duty requires a finding that Directors Dorsey and Durban breached their fiduciary duties to Twitter and engaged in wrongdoing in connection with the acquisition. *See Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001); (FAC ¶¶ 157-60.) To establish this, Plaintiff must prove that the directors owed and breached a fiduciary duty to Twitter. *Id.* ("the complaint must allege facts that satisfy the four elements of an aiding and abetting claim: '(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty...'). It is axiomatic that aiding and abetting "assert[s] a claim of breach of fiduciary duty," which is why courts in this District and in Delaware have found that language in forum-selection clauses identical to the one here apply to such claims. *See Facebook*, 367 F. Supp. 3d at 1120; *Pattern Energy*, 2022 WL 263312, at * 10 n. 8. On top of all that, Plaintiff's action also falls within the scope of the forum-selection clause because he alleges that Dorsey, a Twitter director, engaged in wrongdoing in connection with the merger (e.g., FAC ¶ 78), which is also included in the clause.³

3. The Bylaws' Forum-Selection Clause Is Valid and Enforceable

After establishing that the forum-selection clause applies to this action, the next step is to determine whether it is valid and enforceable. Forum selection clauses are "prima facie valid" *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), and are enforced "unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Atl. Marine*, 571 U.S. at 52. In the Ninth Circuit, courts analyze three principles to determine if extraordinary circumstances exist: (1) the clause is invalid due to "fraud or overreaching," (2) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," or (3) "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court." *Yei A. Sun*, 901 F.3d at 1088. No such circumstance exists here.

³ As discussed in Section I(C), *infra*, because this claim is subject to the forum selection clause, the FAC's other related claims—declaratory relief and unjust enrichment—should likewise be dismissed.

1 **First**, Plaintiff has not alleged that the forum-selection clause is invalid due to fraud or
 2 overreaching, nor can he contend that it cannot be enforced against him. *E.g., Lee*, 34 F.4th at
 3 779; *Boilermakers*, 73 A.3d at 940. **Second**, there are no public policy justifications that override
 4 enforcement of the clause. Plaintiff asserts no federal claims: two of his causes of action are
 5 Delaware state claims and the third seeks declaratory relief regarding a contract governed by
 6 Delaware law; the company defendants are all Delaware corporations; plaintiff resides in Virginia;
 7 and the forum-selection bylaws promote public policy by helping to avoid “inefficient multi-
 8 forum” litigation. *See Facebook*, 367 F. Supp. 3d at 1120 citing *CytRx*, 2015 WL 9871275, at *5.
 9 **Finally**, the third principle is not implicated here. Plaintiff cannot show that he precluded from
 10 pursuing any of the same claims or remedies, all brought under Delaware law, in the contractual
 11 forum. *See Yei A. Sun*, 901 F.3d at 1092 (third *Bremen* principal does not bar enforcement of
 12 forum-selection clause provided there is a “basically fair court system in that forum that would
 13 allow the plaintiff to seek some relief”).

14 4. The Public Interest Weighs In Favor Of Enforcement

15 Courts may consider “public interest” factors—court congestion and administration
 16 concerns, local interest, and which forum is more “at home” with the law at issue—but they
 17 “rarely” defeat a motion. *Atl. Marine*, 571 U.S. at 64. In fact, the factors weigh heavily in favor
 18 of dismissal. First, there are two actions in Chancery Court involving issues associated with the
 19 merger that overlap with Plaintiff’s claims. “Permitting [the] situation,” Plaintiff seeks, in which
 20 multiple cases about the same issues “are simultaneously pending in different...[c]ourts leads to
 21 the wastefulness of time, energy and money.” *See Cont’l Grain Co. v. The FBL*-585, 364 U.S. 19,
 22 26 (1960). Dismissal of this action in favor of the mandatory forum where the issues in this case
 23 are already being litigated would prevent this waste. Local interest does not favor this forum.
 24 Although Plaintiff alleges that some of the actions occurred in California, three of the four
 25 defendants are Delaware corporations, all Defendants are **already** litigating related issues in
 26 Delaware Chancery Court, and Plaintiff is a Virginia resident. *See Moretti v. Hertz Corp.*, No. C
 27 13-02972 JSW, 2014 WL 1410432, at *5 (N.D. Cal. Apr. 11, 2014). The third factor weighs
 28

1 heavily in favor of dismissal as every claim requires an application of Delaware law, with which
 2 Delaware courts have more familiarity. *See CytRx*, 2015 WL 9871275, at *6.

3 **B. The Court Should Dismiss The Entire Action**

4 Because the Bylaws mandate that Delaware Chancery Court, a Delaware state court, be
 5 “the sole and exclusive forum” to adjudicate Plaintiff’s aiding and abetting claim, the entire action
 6 should be dismissed under forum non conveniens. *Atl. Marine*, 571 U.S. at 60 (dismissal under
 7 forum non conveniens is “the appropriate way to enforce a forum-selection clause pointing to a
 8 state or foreign forum”). Where, as here, a mandatory forum-selection requires that at least one
 9 claim be litigated in a state forum, judicial efficiency and the interests of justice provide that the
 10 entire action be dismissed and adjudicated there. *See e.g., Minghong Inv., Inc. v. Felix Chac*
 11 *Chuo*, No. 2:21-CV-05979-SB-PD, 2022 WL 2189365, at *6 (C.D. Cal. Mar. 9, 2022) (dismissing
 12 entire action where a minority of claims were covered by forum-selection clause). Enforcing
 13 forum selection clauses (and preventing plaintiffs from avoiding them through artful pleading)
 14 prevents waste that would arise from trying the case in multiple forums. *See id. (citing Lockman*
 15 *Found. v. Evangelical All. Mission*, 930 F.2d 764, 770 (9th Cir. 1991) (affirming dismissal of
 16 entire action to “the only forum in which the entire case may be tried”)).

17 As discussed above, Plaintiff can offer no credible justification why any claim—let alone
 18 the entire action—should be litigated in this Court. Each of the claims in the FAC arise under
 19 Delaware law and can therefore be resolved in that state’s courts. Plaintiff is not a resident of this
 20 state and the only party that is, Twitter, affirmatively assented to have all of the claims heard in
 21 Delaware. And every party here except Plaintiff is *already* litigating these and related issues in
 22 Chancery Court. Dismissal of this action in this Court in favor of the Chancery Court is therefore
 23 not only mandated by the Bylaws, but prudent and more efficient.

24 **II. PLAINTIFF’S CLAIMS ARE DERIVATIVE**

25 The Holding Companies join Mr. Musk’s Motion to Dismiss the FAC on the grounds that
 26 Plaintiff’s claims seek recovery for harms suffered by Twitter and are therefore derivative in
 27 nature and cannot be brought as a direct action. *See Musk Motion; Tooley v. Donaldson, Lufkin &*
 28 *Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

1 **III. PLAINTIFF FAILS TO STATE A CLAIM FOR AIDING AND ABETTING**

2 Plaintiff's aiding and abetting claim should also be dismissed for failure to state a claim.
3 As discussed in Mr. Musk's Motion, the FAC fails to allege an underlying breach of fiduciary
4 duty, knowing participation in the breach by Mr. Musk, and damages proximately caused by the
5 breach. *Malpiede*, 780 A.2d at 1096. The Holding Companies join that Motion.

6 The claim should also be dismissed against the Holding Companies specifically because
7 Plaintiff alleges no facts giving rise to any liability against them. To plead aiding and abetting,
8 Plaintiff must allege (1) that the Holding Companies "participated in the board's decisions,
9 conspired with the board, or otherwise caused the board to board to make the decisions at issue,"
10 (2) with actual or constructive knowledge that the conduct was legally improper. *Malpiede*, 780
11 A.2d at 1098. The FAC does not come close to meeting these requirements. All Plaintiff alleges
12 is that the Holding Companies "took" some unidentified "actions at Musk's direction to carry out
13 his unlawful conduct." (FAC ¶ 160.) This allegation, pleaded without any underlying facts to
14 support it, is a vague conclusion insufficient to establish Plaintiff's "high" burden to plead that the
15 Holding Companies "knowingly participated" in any breach. *See Bell Atl. Corp. v. Twombly*, 550
16 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the grounds of his entitlement to relief
17 requires more than labels and conclusions"); *Malpiede*, 780 A.2d at 1098 (plaintiff must plead
18 specific facts that third party knowingly participated in breach).

19 **IV. PLAINTIFF LACKS STANDING FOR DECLARATORY RELIEF**

20 **A. Plaintiff Cannot Enforce An Agreement To Which He Is Not A Party**

21 Plaintiff's second cause of action for declaratory relief should be dismissed because he is
22 not a party to the Merger Agreement and lacks standing to enforce it. Standing is a "threshold
23 question in every federal case" and Plaintiff must allege "such a personal stake in the outcome of a
24 controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the
25 court's remedial powers on his behalf." *City of S. Lake Tahoe v. California Tahoe Reg'l Plan.*
26 *Agency*, 625 F.2d 231, 233 (9th Cir. 1980). It is well-settled under Delaware law, which governs
27 the Merger Agreement (FAC ¶ 88), that only parties to a contract and intended third-party
28 beneficiaries have standing to enforce contracts. *See, e.g., E.I. du Pont de Nemours & Co. v.*

1 *MacDermid Printing Sols. L.L.C.*, 248 F. Supp. 3d 570, 575 (D. Del. 2017).

2 As Plaintiff does not allege that he is either a party or third-party beneficiary to the Merger
3 Agreement, his claim fails as a matter of law. *See id.* (party “lack[ed] standing to enforce the
4 Settlement Agreement, because it is neither a signatory to nor an intended beneficiary of that
5 agreement”). Plaintiff’s status as a purported Twitter shareholder does not confer standing either.
6 Holding stock in a corporation does not render a shareholder a party to that company’s contracts; a
7 shareholder’s rights under any agreement a company enters into are limited to “those clearly
8 provided by the [a]greement.” *See Benerofe v. Cha*, 1998 WL 83081, at *6 n.22 (Del. Ch. Feb.
9 20, 1998); *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087,
10 1091 (9th Cir. 2003) (applying Delaware law to hold that shareholders were not parties or third-
11 party beneficiaries to merger agreement). Since Plaintiff does not identify any provision in the
12 Merger Agreement entitling him to enforce or seek a declaratory judgment about it, he has no
13 standing to bring this claim.⁴

14 **B. Plaintiff’s Request For Declaratory Relief Is Not Justiciable**

15 Plaintiff’s claim for declaratory or injunctive relief should also be dismissed because he
16 does not articulate any request for specific and conclusive relief. Declaratory relief “must be of a
17 character which admits of specific and conclusive relief by judgment within the field of judicial
18 determination,” the judgment “must decree, not suggest, what the parties may” do, and “set
19 controversies at rest”. *Gafcon, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 1403–04 (2002).
20 Plaintiff does not ask the Court to issue a specific and conclusive declaration, but rather a general
21 and unspecified declaration “concerning” Mr. Musk’s statements about the Merger “and the
22 parties respective rights and obligations.” (FAC ¶ 165.) But declaring what? And to what end?
23 Plaintiff does not ask the Court to order specific performance or mandate that the parties do
24 anything after opining on his purported unspecified “rights and obligations.” (*See id.*) Where, as
25 here, a plaintiff “does not request an adjudication that it has a right to do, or to have, anything in
26

27
28 ⁴ The Holding Companies also join Twitter’s Motion to Dismiss the Second Cause of Action.

particular,” the action is for an improper advisory opinion and should be dismissed. *See Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 243–44 (1952).

V. ALTERNATIVELY, THE COURT SHOULD STAY DISCOVERY

A. The Court Should Stay Discovery Pending Resolution Of Related Actions

Alternatively, if the Court does not dismiss the FAC outright, discovery should be stayed pending final resolution of the ongoing Chancery Court and S.D.N.Y. actions. The FAC seeks to enforce the Merger Agreement and obtain monetary relief for alleged harm suffered by Twitter following the merger. (FAC ¶ 165.) But Twitter and the Musk Defendants are already litigating the enforceability of the Merger Agreement in the Delaware Action. It is currently is set for trial on October 17; Plaintiff’s claims may be resolved in a matter of months. Conducting distracting and burdensome discovery in the meantime would be a waste of Defendants’ and the Court’s time and resources. The unjust enrichment claims—which, as explained in Mr. Musk’s motion, are barred by SLUSA—overlap with the securities claims in the first-filed S.D.N.Y. Action. Since this case depends almost entirely on the outcome of multiple actions, the Court should exercise its inherent authority to stay discovery pending their resolution.

“The district court has wide discretion in controlling discovery.” *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). The power to stay “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). It is appropriate to issue a stay pending the resolution of a parallel action involving similar claims, indeed, “[c]ourts in this district have routinely granted stays where there are overlapping issues of fact or law with a case before different” courts. *Vance v. Google LLC*, No. 5:20-CV-04696-BLF, 2021 WL 534363, at *3 (N.D. Cal. Feb. 12, 2021) (collecting cases). In determining whether to grant a stay, the Court should weigh the following interests: “possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *CMAX, Inc.*

1 v. *Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (affirming stay of proceedings). These interests all
 2 support a discovery stay pending final resolution of the related actions.

3 1. A Discovery Stay Would Promote The Orderly Course Of Justice

4 Judicial economy is “the primary basis courts consider when ruling on motions to stay.”
 5 *Vance*, 2021 WL 534363, at *6; *see also Fuller v. Amerigas Propane, Inc.*, No. 09-2616 TEH,
 6 2009 WL 2390358, at *2 (N.D. Cal. Aug. 3, 2009) (“Duplication of case management tasks by
 7 multiple courts is not an economical use of judicial resources.”). Thus, in determining whether a
 8 stay promotes the orderly course of justice, courts “may consider the degree of overlap in factual
 9 allegations between parallel cases in order to avoid unnecessary duplicative litigation.” *See.*” *In*
 10 *re Rh S'holder Derivative Litig.*, No. 18-CV-02452-YGR, 2019 WL 580668, at *2 (N.D. Cal. Jan.
 11 23, 2019).

12 The degree of overlap between the FAC and the related actions is significant. The
 13 Delaware Action involves the same parties (except for Plaintiff), relates to the same transaction,
 14 and seeks much of the same relief—enforcement of the Merger Agreement. It cannot be disputed
 15 that a stay of discovery pending its resolution would preserve judicial resources since, as Judge
 16 Kim noted in denying Plaintiff’s Motion to Coordinate and Expedite Discovery, “until the
 17 Delaware action concludes, it is difficult to determine what claims, if any, Plaintiff will have
 18 remaining.” (Dkt. 37 at 5.) The FAC also overlaps with the first-filed S.D.N.Y. Action which
 19 asserts securities claims for the same alleged failure to timely file a Form 13 that gives rise to the
 20 FAC’s unjust enrichment claim. Proceeding with discovery would require the Court and parties to
 21 spend considerable time and resources on claims that are in limbo. The stay should be granted.

22 2. Plaintiff Will Not Be Damaged By A Stay

23 Courts may issue a stay if “it appears likely the other proceedings will be concluded within
 24 a reasonable time in relation to the urgency of the claims presented to the court.” *Rh S'holder*
 25 *Derivative Litig.*, 2019 WL 580668, at *2 (finding plaintiff would be “minimally damaged” where
 26 trial in parallel action was set ten months after the stay request). The Delaware Action is on a
 27 highly expedited schedule currently set to go to trial in weeks. Plaintiff is unlikely to suffer any
 28 damage in the meantime. There is no risk of loss of evidence here either because the parties will

1 complete discovery in the Delaware Action this month and are obligated to preserve all relevant
 2 evidence. *See id.* Moreover, although styled a putative class action, Plaintiff cannot argue that all
 3 of Twitter’s shareholders will suffer harm from a discovery stay because no class has been
 4 certified. *See Vance*, 2021 WL 534363, at *5. A discovery stay presents no real risk of harm and
 5 therefore this interest weighs in its favor. *See id.*; *Rh S'holder Derivative Litig.*, 2019 WL 580668,
 6 at *2.

7 3. Defendants Will Suffer Considerable Hardship Absent A Stay

8 On the other hand, Defendants will be harmed if forced to conduct costly and time
 9 consuming discovery regarding claims that may be resolved or mooted by the Delaware Action or
 10 S.D.N.Y. Action. Proceeding with discovery “would cause both parties to incur significant
 11 expenses on litigation that may be rendered moot,” which weighs in favor of a stay. *See Vance*,
 12 2021 WL 534363, at *5. That there are overlapping issues only compounds the potential cost and
 13 burden suffered by Defendants. *Arris Enterprises LLC v. Sony Corp.*, No. 17-CV-02669-BLF,
 14 2017 WL 3283937, at *3 (N.D. Cal. Aug. 1, 2017) (stay justified by potential substantial
 15 discovery costs incurred by overlapping issues). The Musk Defendants will be further prejudiced
 16 because conducting discovery while these actions pend would necessarily divert their financial and
 17 management resources away from their defense in that case. *See In re STEC, Inc. Derivative*
 18 *Litig.*, No. CV 10-00667-JVS MLGX, 2012 WL 8978155, at *5 (C.D. Cal. Jan. 11, 2012); *Rh*
 19 *S'holder Derivative Litig*, 2019 WL 580668, at 3.

20 **B. Alternatively, Discovery Should Be Stayed Pending Pleading Motion Practice**

21 At minimum, given the numerous fatal deficiencies in the FAC, discovery should be stayed
 22 pending resolution of Defendants’ motions to dismiss both the FAC and any subsequent amended
 23 complaint should Plaintiff be granted leave to amend. The Northern District applies a two part test
 24 to determine whether discovery should be stayed pending resolution of a dispositive motion: (1) is
 25 the motion potentially dispositive of the entire case and (2) can the motion be decided absent
 26 further discovery. *Yiren Huang v. Futurewei Techs., Inc.*, No. 18-CV-00534-BLF, 2018 WL
 27 1993503, at *2 (N.D. Cal. Apr. 27, 2018) (staying discovery where plaintiff filed action in
 28 violation of a forum-selection clause). In applying this test, “the court must take a ‘preliminary

1 peek' at the merits of the pending dispositive motion to assess whether a stay is warranted. *Id.*
 2 Both steps are satisfied here. Defendants' motions to dismiss will dispose of the entire action
 3 because it was filed in the wrong forum, is derivative, and fails to state any claims, for all the
 4 reasons described in Defendants' motions to dismiss. And because the Musk Defendants moved
 5 on the grounds of forum non conveniens, lack of standing, and Rule 12(b)(6), no discovery is
 6 necessary to resolve those motions. Plaintiff has not presented any viable theory that could be
 7 cured by any amendment to the FAC (much less in this forum), but nonetheless, if leave were to
 8 be granted, a stay while further pleading motions are resolved would likewise further judicial
 9 economy and could be resolved without any discovery. Accordingly, there is ample good cause
 10 here to stay discovery pending resolution of pleading motions at a minimum.

11 CONCLUSION

12 For the reasons stated herein, the Holding Companies respectfully request that the Court
 13 grant the Holding Companies' Motion and dismiss the FAC in its entirety.

14 DATED: September 9, 2022

15 QUINN EMANUEL URQUHART &
 16 SULLIVAN, LLP

17 By /s/ Joseph C. Sarles

18 Alex Spiro
 19 Michael T. Lifrak
 20 Joseph C. Sarles
 Alex Bergjans
 Aubrey L. Jones

21 *Attorneys for Elon Musk, X Holdings I, Inc., and*
 22 *X Holdings II, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on all counsel of record electronically or by another manner authorized under FED. R. CIV. P. 5(b) on this the 9th day of September 2022.

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By /s/ Joseph C. Sarles

Alex Spiro
Michael T. Lifrak
Joseph C. Sarles
Alex Bergjans
Aubrey L. Jones

*Attorneys for Elon Musk, X HOLDINGS I, INC.,
and X HOLDINGS II, INC.*